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### IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

#### FOURTH APPELLATE DISTRICT

#### DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

G055556

v.

(Super. Ct. No. 14HF3071)

JASON VU,

OPINION

Defendant and Appellant.

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melisa Mandel, Meredith White, and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted Jason Vu of one count of possession of heroin for sale (Health & Saf. Code, § 11351) and one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court suspended imposition of sentence and granted Vu probation.

Vu contends the trial court erroneously denied his Penal Code section 1538.5 motion to suppress evidence, <sup>1</sup> and that his trial counsel was constitutionally ineffective for not moving to suppress on the specific ground that his consent was involuntary. The trial court did not err, and Vu has not demonstrated his counsel was ineffective. Consequently, we affirm the judgment.

### FACTUAL AND PROCEDURAL HISTORY

Vu does not contest his conviction or sentence; he only challenges the denial of his pretrial motion to suppress. Our discussion is thus limited to that motion, the People's written response, the testimony at the hearing, and the trial court's ruling. In his appellate briefing, Vu includes citations to testimony and evidentiary rulings from both his trial and the motion. Trial evidence and rulings are irrelevant to this appeal, and we therefore do not consider them.

Vu's pretrial motion alleged police unreasonably entered his apartment and searched his premises and property without a warrant. He sought to suppress all statements he made to police after their entry and all physical evidence seized during their subsequent searches. Vu's grounds for suppression were that police did not have an

Subsequent statutory references are to the Penal Code.

arrest warrant for him, nor had they obtained a search warrant for his person, property, or premises.

The People contended the warrantless entry was reasonable because police had reason to believe Shayne Miller, who was on federal probation and subject to warrantless search and seizure, resided at the property. They also knew Miller was the subject of an active federal arrest warrant. Vu was in the apartment when the police entered. Police searched his person, apartment, safe, and phone pursuant to Vu's consent. Based on the results of the searches, the People concluded Vu's arrest was supported by probable cause.

At an evidentiary hearing on Vu's suppression motion, an officer testified to the details of the entry and the circumstances of Vu's consent. Vu testified that he did not consent to any searches. The trial court found the officer's testimony more credible than Vu's and denied the motion.

## 1. Prosecution Evidence

Newport Beach Police Officer Kyle Markwald testified he received information from a U.S. Marshal's Task Force that Shayne Miller was on federal probation, subject to a search and seizure condition, and he had an active federal arrest warrant. Defense counsel stipulated to these facts.

Based on prior contacts and arrests in the area, Markwald believed Miller resided at the Coronado apartment complex in Newport Beach. On November 21, 2014, he went to the complex leasing office, where a manager showed him a lease agreement on her computer monitor; both Miller and Vu were named on the lease.

The prosecutor introduced Exhibit 2, entitled "Resident Charges/Payments Ledger." Markwald testified he believed Exhibit 2 was a lease agreement shown to him

Exhibit 2 shows "Shayne Miller" and "Jason Vu" in "Unit K306," and refers to a lease from "02/19/2014" to "02/19/2015." Rent was received from "Shayne Miller" in April and May of 2014 and "Jason Vu" after June 2014.

by the apartment manager. After verifying with the leasing manager that Miller was listed on the lease, the officers obtained a master key.

Officers knocked, and announced: "Police department. Warrant service.

Don't move." As they entered, at least one of the officers drew his gun. Markwald saw

Vu, Alex Watt, and Jessica Dawson sitting at a table; they appeared to be playing a dice
game. Another officer stated they were there to serve a warrant for Miller. Vu replied

Miller had not been there for a few days and that he believed Miller was in a "drug rehab
program."

Markwald noticed a meth pipe sitting on the table. On the floor near Dawson, he also saw a piece of aluminum foil with dark lines indicative of heroin smoking. He asked Dawson if the foil belonged to her and she told him it did. He asked for consent to search her person; she agreed, and he found what he believed was methamphetamine.

Another officer spoke with Vu. The officer asked Vu if there were any additional pipes, methamphetamine, or other drugs in the apartment. Vu told the officer that there was methamphetamine under the bathroom sink, and "pills" and "weed" in the closet.

Vu was then asked for consent to search the apartment, and Markwald testified Vu gave his consent. Markwald stated Vu was not handcuffed until after he had consented to search both the apartment and later his phone. Markwald also said Vu was not threatened in any way.

During their search, officers recovered eight pipes, methamphetamine, and an electronic scale. Inside Vu's closet, they discovered a small safe. Markwald said Vu admitted the safe belonged to him and, when asked for the safe's key, Vu stated it was with his car keys. Vu directed officers to his keys, and Markwald opened the safe. Inside, Markwald found a ball of a substance he believed was heroin, Vu's wallet, and some cash.

The officers noticed a phone on a counter near Vu, and he confirmed the phone was his. Markwald asked Vu for consent to search the phone; Vu gave his consent and provided the code required to unlock it. A search of the phone revealed incriminating text messages and "app messages." Markwald testified Vu did not object or withdraw his consent during any of the searches.

## 2. Defense Evidence

Vu testified he lived in apartment K306, a studio apartment with one large room and a bathroom. He insisted he was the only person on the lease, he made all the rent payments, and Miller never lived there.<sup>3</sup> He denied anyone said anything about Shayne Miller before the police entry.

Vu said six or seven uniformed officers, all with guns drawn, entered the apartment with a key and only then announced themselves. Vu was then sitting on a couch with his two friends, Watt and Dawson. Vu said the officers walked by him, went directly to Watt, drew their guns on him, and said they were there to arrest him, calling him Shayne Miller. Watt said he was not Miller and presented ID. One officer then pointed a gun at Vu and frisked him. Vu insisted they never asked him about Shayne Miller; he only heard them mention Miller's name to Watt. He denied telling the officers Miller had not been there for a few days.

Vu denied there was a piece of foil on the floor next to Dawson's foot, claiming instead the officers found the foil in her purse. Vu testified that when the officers saw the meth pipe, they told him that because of the pipe, they were permitted to search the entire apartment; they then began their search. One of the officers asked him who lived in the apartment, and Vu said he gave his name and showed his ID.

The defense introduced Exhibit 3, a lease to apartment K306 showing Vu as the sole lessor. The "Lease Term" was from February 19, 2014 to February 19, 2015.

Vu insisted he never gave permission to search. Instead, he maintained he asked to see a search warrant when police first began searching, telling them, "I know my rights."

When the officers found the safe in his closet, they brought it out and asked Vu for the key. He told them he did not know where it was. They searched the apartment, found the key in one of Vu's shirts, and opened the safe without his permission. He was handcuffed before the officers searched the safe or his phone, "when [he] wouldn't be quiet."

While one officer was examining Vu's phone, an incoming call from his girlfriend came in and the officer asked if he could answer it. Vu said he did not respond, and instead asked the officer if he could talk to her. The officer declined his request. On cross-examination, Vu admitted that when the officer asked if he could answer the incoming call, he responded, "I said, you know, yeah . . . if you want to answer." The prosecutor asked, "But when it rang, they asked you hey, can we answer the phone?" and Vu replied "Yes." Vu claimed no code was needed to answer an incoming call, and once the phone was "opened," he thought it gave access to all the "information" on the phone.

Vu denied the officers asked for consent to search his phone, but agreed he gave them the code when asked. Vu conceded he did not tell them to stop looking through the phone after giving them the code. He testified the entire encounter lasted roughly one hour, and he did not feel free to leave during that time. Vu said he was arrested sometime "in the middle" of that hour and read his rights, but also said he was not read his *Miranda* rights until "right before they took me in."

# 3. The Trial Court's Ruling

The court found the officers reasonably suspected Miller was in the apartment. Although the officers "could have done more," the court found they acted reasonably, and concluded it was reasonable for them to believe Miller lived there.

As for consent, the court noted Markwald and Vu gave conflicting testimony, so it had to assess the relative credibility of the two witnesses. The court found Markwald to be a credible witness, stating: "I won't say that the defendant was not credible. I just found [Markwald] more credible." The court concluded: "Overall, I find the officer to be more credible. . . . As I said, as it is, the court needs to make a credibility determination, and I have done so. . . . [T]herefore, I am going to deny the motion."

#### **DISCUSSION**

## 1. Background

"A defendant may move to suppress evidence under section 1538.5 on grounds that a search without a warrant was unreasonable. A warrantless search is presumptively unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.] In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings, express or implied, where supported by substantial evidence. [Citation.] And in determining whether, on the facts so found, the search was reasonable for purposes of the Fourth Amendment to the United States Constitution, we exercise our independent judgment." (*People v. Simon* (2016) 1 Cal.5th 98, 120 (*Simon*).)

Specifically, "[a]s the finder of fact in a proceeding to suppress evidence [citation], the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable." (*People v. Woods* (1999) 21 Cal.4th 668, 673 (*Woods*).) We view the facts in the light most favorable to the trial court's ruling, resolve all conflicts in its favor, and defer to those express or implied findings supported by substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969; *Woods, supra*, 21 Cal.4th at p. 673.)

"It is well settled . . . that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' [Citations.] It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 219 (Schneckloth).) Guided by these standards, we assess the legality of the police actions based upon the testimony of Markwald, whose testimony the trial court found more credible than Vu's.

# 2. The Suppression Motion Was Properly Denied

On appeal, Vu does not contest the initial police entry, so we need not address it further. Rather, he focuses on the issue of consent and, despite the trial court's contrary finding, argues the People failed to show he consented to the searches of his person, property and apartment. Vu also contends that, even if we find he did consent—his sworn testimony notwithstanding—he did not do so freely and voluntarily. We are not persuaded.

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances. . . . " (*Ohio v. Robinette* (1996) 519 U.S. 33, 40.) "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." (*Florida v. Royer* (1983) 460 U.S. 491, 497) The prosecution must demonstrate consent "was [not] coerced by threats or force, or granted only in submission to a claim of lawful authority." (*People v. Boyer* (2006) 38 Cal.4th 412, 445-446; *Schneckloth, supra*, 412 U.S. at p. 248 [the Fourth and Fourteenth Amendments require the prosecution show consent was not a result of duress or coercion, express or implied].) This burden requires

proof by a preponderance of the evidence. (*United States v. Matlock* (1974) 415 U.S. 164, 177, fn. 14.)

Whether a defendant voluntarily consented is a question of fact to be determined in light of all the circumstances, as our standard of review on a consent issue is substantial evidence. (*People v. Byers* (2016) 6 Cal.App.5th 856, 864 (*Byers*).) """The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. . . . [T]he trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.""" (*People v. Balov* (2018) 23 Cal.App.5th 696, 701.)

"A 'person's in-custody status, even when he is handcuffed, does not automatically vitiate his consent." (*Byers, supra*, 6 Cal.App.5th at p. 864.) Likewise, "the failure to give *Miranda* warnings does not render a consent to search involuntary." (*People v. Ratliff* (1986) 41 Cal.3d 675, 686 (*Ratliff*).) In *People v. Llamas* (1991) 235 Cal.App.3d 441 (*Llamas*), for example, the court found that, even though illegally detained, arrested, handcuffed, and placed in the back of a patrol car, there was no implicit coercion negating a defendant's consent to search. (*Id.* at p. 447.)

Even if a suspect was initially detained at gunpoint and handcuffed when consent was obtained, an ensuing consent is not necessarily invalid. In *Ratliff*, the defendant was awakened by police officers with drawn guns. After handcuffing and interrogating him for a few minutes without *Miranda* warnings, the officers requested permission to search his car. The court found a valid consent: "We decline to hold that, as a matter of law, a consent to search is invalid solely because the officers originally drew their guns when confronting defendant." (*Ratliff*, *supra*, 41 Cal.3d at p. 686.)

Vu contends he "was traumatized and terrified prior to giving his consent to search the apartment." This assertion is consistent with the trial court's observation that "it must have been kind of traumatic to have these officers coming in" to his residence.

Nonetheless, after scrutinizing the totality of the circumstances here, and accepting the

trial court's credibility determinations, we find no evidence Vu was threatened or tricked into acceding to the officers' requests, or any indication Vu was led to believe he could not withhold his consent. "There was no overt act or threat of force against [defendant] proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but . . . the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. . . . There is no indication . . . [defendant] was . . . mentally deficient, or unable in the face of a custodial arrest to exercise a free choice." (*United States v. Watson* (1976) 423 U.S. 411, 424-425, fn. omitted.) Nor is there any indication here that Vu was led to believe he must consent. (*Llamas, supra*, 235 Cal.App.3d at p. 448.) Indeed, the evidence showed the officers *requested* Vu's permission to perform their searches; carrying with it an implication that he could withhold his consent. (*People v. James* (1977) 19 Cal.3d 99, 116.)

In short, on this record, we "conclude that substantial evidence supports the trial court's implied finding" that Vu's consent "was an independent act of his free will." (*Llamas, supra,* 235 Cal.App.3d at p. 448.)

## 3. Vu Has Failed to Show His Trial Counsel Was Ineffective

Vu also contends his trial attorney was ineffective for not specifically seeking to suppress the physical evidence on the basis his consent was involuntary. Once again, we are not persuaded.

Trial counsel's grounds for suppression were that Vu's apartment was illegally entered, his person and property were searched, and evidence was seized without an arrest warrant or a search warrant. He sought to suppress all evidence, physical and otherwise. This was all that was required of trial counsel at the initial stage because this shifts the burden to the prosecution: "[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation,

at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification. (*People v. Williams* (1999) 20 Cal.4th 119, 136.)

Here, the People responded that the warrantless initial entry was permissible given Miller's arrest warrant and search and seizure condition, Vu's detention was lawful, and any statements he made while detained were lawfully obtained. The People justified the warrantless searches and seizures of Vu's premises and property with the consent exception to the warrant requirement. Trial counsel, in turn, contested the adequacy of this justification, and Vu testified he did not consent.

Vu nonetheless now asserts his counsel was ineffective for not specifically contesting the *voluntariness* of his consent, even though in his sworn testimony he denied consenting. He claims "counsel had nothing to lose and everything to gain by bringing [this additional ground in his] suppression motion. There cannot have been any rational tactical purpose to fail to try to suppress the physical evidence given the arguably unconstitutional consent to search. Counsel's performance was unreasonably deficient." (Italics omitted.) We disagree.

Initially, we reiterate that whenever the prosecution "attempts to justify a search on the basis of [a] consent, the Fourth and Fourteenth Amendments require that it *demonstrate* that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (*Schneckloth, supra,* 412 U.S. at p. 248, italics added.) The voluntariness of Vu's consent, therefore, was fleshed out and resolved in the trial court. In order to find a valid consent, the trial court necessarily had to find not only that Vu consented, but also that his consent was voluntary.

In *Llamas*, the defendant argued the trial court made no specific findings regarding the voluntariness of his consent. The court disagreed: "In reaching its decision the trial court reasoned that the police 'did get consent.' This conclusion may be inferred

to include a finding that such consent was validly obtained — that is, free of coercion." (*Llamas, supra,* 235 Cal.App.3d at p. 447, fn. 2.) As in *Llamas*, we find the trial court's denial of the suppression motion was based not only on a finding of consent, but also of a voluntary consent.

Moreover, to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance was prejudicial. (Strickland v. Washington (1984) 466 U.S. 668, 687 (Strickland).) "Surmounting Strickland's high bar is never an easy task." (Harrington v. Richter (2011) 562 U.S. 86, 105 (Richter), quoting Padilla v. Kentucky (2010) 559 U.S. 356, 371.) This is because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence." (Richter, supra, 562 U.S. at p. 105.) "Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients." (United States v. Cronic (1984) 466 U.S. 648, 658, fn. 23.)

"A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion . . . must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion . . . would have been meritorious if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted." (*People v. Mattson* (1990) 50 Cal.3d 826, 876.) More precisely, "[t]o establish

prejudice . . . the defendant must do more than show the motion would have been meritorious. When the alleged deficiency is the failure to make a suppression motion, the defendant must show, in addition, the motion would have been successful." (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 438; cf. *Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [same standard applies on federal habeas review].)

Vu relies on *People v. Ledesma* (1987) 43 Cal.3d 171, and asserts it is "highly instructive." We disagree.

Ledesma was a habeas corpus proceeding in a capital case where trial counsel was found ineffective for several reasons including failing to file a suppression motion. While looking for the defendant, police had entered his apartment and searched it without a warrant. The defendant was not present. (Ledesma, supra, 43 Cal.3d at p. 177.) During their questioning of the occupants, the phone rang, and an officer answered. The caller said he was the defendant, "that he was 'hot' and knew the police were after him, and that she should lock the apartment and [his car] and take a walk." (Ibid.) At trial, the officer testified about the phone call without objection. (Id. at pp. 182-183.)

A referee held an exhaustive evidentiary hearing, which totaled 30 volumes of transcripts and involved 16 allegations of trial counsel's ineffective representation. (*Ledesma, supra*, 43 Cal.3d at pp. 191-193.) During this hearing, an experienced criminal defense attorney opined trial counsel was incompetent on a number of grounds, including "that reasonably competent counsel would have made numerous motions in this case including, for example, motions to bar reference to the intercepted telephone call." (*Id.* at p. 201.) A second defense expert witness testified similarly, emphasizing "the necessity of pretrial motions—on such foreseeable questions as the admissibility of the intercepted telephone call . . . ." (*Id.* at p. 204.) "[Y]ou want to attempt to suppress the evidence pretrial pursuant to 1538.5 in limine . . . with regard to the . . . telephone call . . . ." (*Ibid.*)

The referee concluded trial counsel was ineffective for numerous reasons, including his failure "to attempt to bar reference to the telephone call intercepted by [the officer]. . . . He further concluded that such an effort would likely have succeeded: the police intercepted the telephone call after they entered defendant's residence without a warrant and apparently in the absence of exigent circumstances or effective consent." (*Ledesma, supra,* 43 Cal.3d at pp. 208-209.)

The court sustained the referee's findings, and granted the habeas corpus petition. (*Ledesma, supra*, 43 Cal.3d at p. 227.) The court found "the telephone call was of critical importance to the prosecution's case. . . . [¶] [W]e conclude that the intercepted telephone call was not beyond challenge. It is undisputed that the police officers entered defendant's apartment without a warrant. Such an entry, of course, presumptively violates the Fourth Amendment and taints the evidence seized as a result." (*Id.* at pp. 226-227.)

Here, unlike in *Ledesma*, trial counsel *did* move pretrial to suppress the contested evidence and the suppression issues were litigated fully. The prosecution produced testimony and legal authority, as did Vu's counsel, and the trial court denied the suppression motion on credibility grounds.

Vu now seems to suggest his trial counsel was ineffective for not telling the trial court to disregard his client's testimony that he had not consented, and instead find his consent was involuntary. He provides no authority for this novel position, nor have we found any.

As observed above, in order to rely on consent to justify these searches, the People were legally required to show it was a valid consent, i.e., it was voluntary. Indeed, the People's opposition brief acknowledged at the outset that consent must be voluntary in order to be valid. The trial court's ruling that Vu consented to the searches implicitly necessitated a finding of voluntariness.

The fatal flaw in Vu's ineffective assistance contention is that his testimony at the motion hearing crystallized the consent issue for the trial court, for his counsel, and for us. Vu made his proverbial bed with his testimony denying consent, and his trial counsel was not ineffective for having been forced to let him sleep in it.

# **DISPOSITION**

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.